## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA DAVENPORT DIVISION

SHIRLEY J. SHEETS,	)	
Plaintiff,	) ) )	Civil No. 3-99-cv-30091
v.	)	
NATIONAL COMPUTER SYSTEMS, INC.,	)	RULING ON DEFENDANT'S
Defendant.	)	MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on defendant's motion for summary judgment. Plaintiff Shirley Sheets filed her complaint on May 17, 1999, alleging defendant failed to transfer her to another position in the company and then terminated her in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq. Plaintiff seeks compensatory damages.

Jurisdiction is predicated on 28 U.S.C. §§ 1331 and 29 U.S.C. § 626(c). The parties consented to proceed before a United States Magistrate Judge and the case was referred to the undersigned for all further proceedings on October 18, 1999.

See 28 U.S.C. § 636(c).

I.

Defendant is entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that [movant] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Although we view the facts in a light most favorable to the non-moving party, in order to defeat a motion for summary judgment, the non-moving party cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit.

Carter v. St. Louis University, 167 F.3d 398, 400 (8th Cir. 1999). Motions for summary judgment in employment cases should be approached with caution because such cases "often depend on inferences rather than on direct evidence. " Mems v. City of St. Paul, 224 F.3d 735, 738 (8th Cir. 2000)(citing Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994)). See also Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1016 (8th Cir. 2000); Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999). Still, summary judgment "remains a useful pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial. " Berg v. Norand Corp., 169 F.3d 1140, 1144 (8th Cir.), cert. denied, 120 S. Ct. 174 (1999); see Snow v. Ridgeview Medical Ctr., 128 F.3d 1201, 1205 (8th Cir. 1997)("summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case").

II.

The following facts are, except where noted, without material dispute in the summary judgment record viewed favorably

to Ms. Sheets. Shirley Sheets was first employed by National Computer Systems, Inc. ("NCS") in the spring of 1973 as a temporary employee and became a full-time employee on September 17, 1973. Her date of birth is December 9, 1939. In September 1980 she became a switchboard operator/receptionist for NCS. In this position, she was required to perform a broad range of receptionist duties including operating a telephone system to ensure that all calls were properly routed in a friendly, professional and timely manner and security for the building. NCS considers the switchboard operator/receptionist position important because it is usually the first point of contact for customers, job applicants, other company employees and vendors.

There was frequent turn-over of the supervisors over Sheets. In 1992, her performance was evaluated by John Bandy. His overall evaluation of Sheets was "effective," although in "Areas That Need Improvement" he noted that "Shirley is sometimes perceived as abrupt or short when answering the phone.

<sup>&</sup>lt;sup>1</sup> As referenced herein, documents designated "DRP" and "ICRC" are attached as a group of documents under a cover sheet labeled "Plaintiff's Response to defendant's Request for Production of Documents." Similarly, documents designated "NCS" are attached as a group of documents under a cover sheet labeled "Defendant's Response to Plaintiff's Request for Production of Documents and Documents from Defendant's Response." Both groups of documents are attached to plaintiff's Statement of Material Facts in Dispute.

She needs to continue to be conscientious of the callers [sic] perception." (Sheets Depo., Ex. B).

In June 1993, Sheets' performance was evaluated by William Waterbury, who rated her overall as "effective plus" and "outstanding" in customer service, noting "Shirley is very conscious of the customer's needs and does her best to assist them in all ways possible. She handles difficult customers with tact even though the situation is not easy to deal with." (Pl. Ex. 24). Prior to this, in March 1993, Waterbury had recommended a bonus for Sheets based on her performance.

From the summary judgment record it appears the switchboard at NCS was extremely busy and got busier as NCS's business increased. Another switchboard operator/receptionist, Judy Sueppel, whose date of birth is September 29, 1941, was added to assist Sheets. (Sueppel Depo. at 6, 16). Sueppel had worked for NCS twenty-four years and stepped down from serving as senior coordinator for the Communications Center to take the switchboard position, a job change which came about as a result of reorganization of the Communications Center staff. (Id. at 5, 7-8, 16). At about the same time, in October 1993 Wendy Ranard became Sheets' supervisor. In December 1993 Ranard changed the schedule of relief operators and added some new responsibilities to the switchboard. (Pl. Ex. DRP-0104-56). From the start,

Ranard perceived Sheets' attitude towards callers, visitors and employees to be curt, rude and unfriendly. (Ranard Depo. at 33-34).

On April 12, 1994, Ranard held a meeting with her supervisor Paul Massey, Sheets and Sueppel to switchboard standards, specifically the need to have both switchboards on at all times so calls would get answered as quickly as possible. (Ranard Depo. at 48). Defendant characterizes the meeting as a verbal warning to Sheets about improving customer service. Plaintiff argues no verbal warning was issued at this time and the Court accepts her version for motion purposes. A follow-up meeting was held on May 4, 1994 with Barbara VanderWoude or Patricia Shephard (both of Human Resources), Ranard, Sueppel and Sheets attending. (Pl. Ex. 16).

In May 1994 NCS conducted a survey of internal and external users. (Pl. Ex. 4). In summarizing the results, areas noted as needing improvement included, "quicker response time for incoming calls" and "front desk personnel's switchboard, reception and paging etiquette." (Id.) Following the survey, a system of telephone audits was set up to monitor switchboard activity. (Ranard Depo. at 41-42). Sheets had calls audited thirteen times between October 5, 1994, and April 3, 1995, and on each occasion she met company standards. (ICRC Ex. 4).

On August 10, 1994, Ranard gave Sheets an annual performance appraisal, rating plaintiff's overall job performance as "effective." (Sheets Depo., Ex. C). Ranard did make a number of statements in the "Teamwork/Attitude" and "Customer Service" sections regarding negative comments she had received about front desk service and Sheets in particular, and rated Sheets at the low end of "effective" in both categories. (Id.) In written comments on the appraisal Sheets denied making negative remarks about the company and complained that Ranard had called both her and Sueppel "bitch" on two occasions, once at the front desk. (Id.)

Ranard met with Sheets on August 10 to go over the appraisal. Sheets left the meeting. Ranard held a follow-up meeting with Sheets about the evaluation on August 26, 1994. Sheets left the second meeting after telling Ranard she was not accurately reflecting Sheets' performance. (Ranard Depo. at 65-66). It appears on this occasion, Ranard set out goals and objectives for improving Sheets' performance, noted that front desk and switchboard operation standards would be established and that Sheets was expected to adhere to the standards. (Sheets Depo., Ex. D). Sheets refused to sign the evaluation on both occasions. (Sheets Depo., Ex. C).

On September 13, 1994, Ranard held an additional follow-up meeting with Sheets. Ranard had prepared a script for the meeting, which was her general practice in order to stay organized. (Ranard Depo. at 64, 91; Pl. Ex. 10). At this time Ranard explained to Sheets her expectations for professional behavior and Sheets' evaluation and that her performance would be reviewed on an ongoing basis. (Pl. Ex. 10). On the same date, Ranard sent out to staff in the Communications Center a memo detailing departmental standards and expectations. (Pl. Ex. 18). On September 21, 1994, Ranard sent out more specific directives regarding switchboard standards. (Pl. Ex. 17).

In September 1994 a job position of receptionist was posted for the newly constructed Plaza Building. As listed, the position required typing (though it appears from the summary judgment record that typing was not particularly important for the position) and did not include the switchboard operator duties. (Sheets Depo. at 24). Plaintiff applied for this position, but it remained unfilled until January 1995 when Mary Lenz, date of birth October 8, 1947, was hired. (Id. at 25; Lenz Depo. at 2, 4). Sheets was told by Colleen Gross-Advani, the human resources representative in charge of the posting, she was not qualified for the job but there is nothing specific in the summary judgment record as to why Sheets was not considered

qualified. (Sheets Depo. at 26). Sheets states she was qualified for the job and complains that NCS Job Posting Policy<sup>2</sup> was not followed. She does not dispute Lenz's work experience prior to working for NCS as including fourteen years as a school secretary and six years as a secretary/receptionist/switchboard operator for an architectural firm.

On October 14, 1994, Sheets received a written "Action Plan for Performance Improvement" from Ranard which outlined an incident which she was told breached confidentiality, another

All regular employees must be rejected before temporary employees or other external candidates are considered for open positions.

\* \* \*

Employees who are on an Action Plan for Performance Improvement both at the written notice and at the probation stage will be considered with other regular candidates in the candidate pool . . [M]anagers may choose not to interview candidates who are at the probation stage.

\* \* \*

Managers will be encouraged to provide honest feedback to candidates regarding the hiring decision either in writing or verbally.

DRP-01-04-33.

<sup>&</sup>lt;sup>2</sup> NCS Job Posting Policy in effect when plaintiff applied for the position stated, in pertinent part:

incident of negative comments and a failure to follow departmental standards. (Sheets Depo., Ex. E). Sheets was notified "[f]uture incidents of inappropriate communication or not adhereing [sic] to departmental standards may result in further disciplinary action" including probation. (Id.) Judy Sueppel received a similar written action plan the same day, although breach of confidentiality was not referenced in her warning. (Pl. Ex. 15). Ranard and Sheets dispute whether the incidents occurred as set out in the action plan.

On January 25, 1995, Sheets received another action plan for failure to adhere to departmental standards. At this time plaintiff was placed on probation and notified if her performance did not improve, she could be terminated. (Sheets Depo., Ex. F). Sheets again challenged the incidents set out in the action plan, stating she had not been informed of the charges in advance and had no opportunity to defend herself. (Sheets Depo, Ex. F, p. 3). Ranard began to meet weekly with Sheets beginning February 8, 1995 to attempt to improve Sheets' work performance. (Sheets Depo. at 56). Sheets complains that the meetings consisted of Ranard telling her about general complaints without a lot of detail. (Id. at 8-9).

In March 1995, Sheets made an internal application for a position of programmer aide in another department, which

required a 20 wpm typing score. Sheets' test score was 19.84 and the department manager, Fred Hackett, interviewed her for the position. (ICRC Ex. 8). His hiring decision was pending at the time Sheets was discharged. (Sheets Depo. at 19).

On April 13, 1995, Ranard informed Sheets she had received additional complaints regarding Sheets' customer service and negative attitude. (Ranard Depo. at 90-91). The January written warning was discussed and Sheets was told that one more incident would result in her termination. (NCS 123). Barbara VanderWoude from Human Resources was present at this meeting and shared information with Sheets about other open positions in the company. (Id.) Sheets testified the opening was in a department whose manager was reputed to have made remarks about getting rid of old women and declined to apply for the position. (Sheets Depo. at 20-21).

On April 17, 1995, Kathy Minette, Human Resources Manager, received an unsolicited complaint from an employee, Shannon Dundon, about the treatment she received from Sheets on the phone. (Sheets Depo. at 57; Minette Depo. at 27-29; Pl. Ex. 26). Sheets questions whether Dundon was an employee and

 $<sup>^3</sup>$  The manager, Greg Burian, reportedly made a derogatory comment at a staff meeting about the performance of older employees for which he was not disciplined. (Phipps Aff. at 3; Phipps Depo. at 14-17).

complains no one confirmed whether it was actually she to whom Dundon had spoken. Minette was aware that Sheets was on final written plan but was not aware that this incident would count as the terminating event. (Minette Depo. at 27). As a result of the complaint, Ranard and VanderWoude met with Sheets, informed her of the complaint and terminated Sheets' employment. (Sheets Depo. at 56-58). It is fair to infer from the record that Ranard was the principal decision maker in connection with the termination.

After Sheets was terminated, her position was temporarily filled by a younger individual, Catherine Meier, age 25. (Aff. of Ranard, ¶ 3). The switchboard operator position was posted for applications and after three or four weeks, Ranard interviewed and hired Mary Steckley on June 5, 1995. (Steckley Depo. at 12-13; Aff. of Ranard, ¶¶ 4-7; Def. Answer to Interrogatory No. 5). Steckley's date of birth is March 8, 1936; she was 59 years old at the time she was hired. (Steckley Depo.

 $<sup>^4</sup>$  Sheets questions whether the opening was posted and notes former NCS human resources representative John Phipps said in his affidavit that to his knowledge the position was never posted or advertised. (Aff. of Phipps at 3). In his deposition Phipps testified he did not presently recall, but that was his recollection when he prepared his affidavit. (Phipps Depo. at 30). In her affidavit Ranard said the position was posted (Aff. of Ranard  $\P\P$  3, 4) and Steckley has testified she learned of the job from a posting. (Steckley depo. at 7).

at 4; Def. Answer to Interrogatory No. 5). Steckley remains in the position. (Def. Answer to Interrogatory No. 5).

Sheets filed a charge of age discrimination on May 8, 1995. (ICRC Ex. 1). Ranard was not aware of the charge at the time she hired Steckley. The charge was administratively closed on May 9, 1997. Sheets sought and obtained a reopening of her file before the Iowa Civil Rights Commission. The file was administratively closed a second time on December 8, 1998. Plaintiff's lawsuit was filed May 17, 1999.

III.

Under the ADEA it is unlawful for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's age;

Id. § 623(a). Congress' stated purpose in enacting the ADEA was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." Id. § 621(b). Provisions for enforcement of the ADEA are found in section 626(e) of the Act.

<sup>&</sup>lt;sup>5</sup> <u>See, e.g.</u>, <u>Bradford v. Norfolk Southern Corp.</u>, 54 F.3d 1412, 1421 (8th Cir. 1995).

McDonnell Douglas/Burdine6 and the Waterhouse theories of burden-shifting have been applied in ADEA cases, although without the limitations on relief set out in the 1991 amendments to the Civil Rights Act. Widoe v. District No. 111 Otoe County School, 147 F.3d 726, 732 (8th Cir. 1998)(pretext case); Reynolds v. Land O'Lakes, Inc., 112 F.3d 358, 361 (8th Cir. 1997)(pretext case); Nitschke v. McDonnell Douglas Corp., 68 F.3d 249, 253 (8th Cir. 1995)(plaintiff did not meet burden in order to rely on mixed-motives analysis); see 29 U.S.C. §§ 623(a)(1), 626(b)&(c)(2)(incorporating remedy provisions of Fair Labor Standards Act, not Civil Rights Act). The parties agree the Court should follow the McDonnell Douglas analysis in this case.

The elements of a prima facie ADEA case involving discharge or failure to hire/transfer include a showing that (1) plaintiff is a member of a protected class; (2) her job performance met legitimate expectations of the employer or she was qualified to perform the job; (3) she suffered adverse employment action, i.e., was discharged or not hired; and (4) she was replaced by or the job for which she applied was filled

<sup>&</sup>lt;sup>6</sup> <u>McDonnell Douglas Corp. v. Green</u>, 411 U.S. 792 (1973) and <u>Texas Dep't of Comm. Affairs v. Burdine</u>, 450 U.S. 248 (1981).

<sup>&</sup>lt;sup>7</sup> Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

by a person "sufficiently younger to permit an inference of age discrimination." Schiltz v. Burlington Northern Railroad, 115 F.3d 1407, 1412 (8th Cir. 1997); see Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 919 (8th Cir. 2000); Keathley v. Ameritech Corp., 187 F.3d 915, 919 (8th Cir. 1999); Ziegler v. Beverly Enterprises-Minnesota, Inc., 133 F.3d 671, 675 (8th Cir. 1998).

Once plaintiff has made a prima facie case, it is incumbent on the employer to rebut the resulting presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its decision. Tatom v. Georgia-Pacific Corp., 228 F.3d 926, 931 (8th Cir. 2000). The burden then shifts back to plaintiff to demonstrate that the reason given was not the real reason, but a pretext for discrimination.

Thus, at the summary judgment stage, the Court analyzes

whether plaintiff has sufficiently established a prima facie case of discrimination, (2) whether defendant has sufficiently met its burden of producing a legitimate nondiscriminatory explanation to rebut plaintiff's prima facie case, and (3) plaintiff has sufficiently demonstrated that the proffered reasons were not the true reasons for the employment decision and that there is a genuine issue of material fact regarding the ultimate question of age discrimination.

Widoe, 147 F.3d at 729 (citing St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502, 506-08 (1993)); see Reeves v. Sanderson Plumbing

Products, Inc., 530 U.S. 133, \_\_\_, 120 S. Ct. 2097, 2106 (2000);
Keathley, 187 F.3d at 919.

NCS maintains plaintiff cannot establish a prima facie case on her discharge claim because she cannot show she was replaced by a substantially younger individual. On her failure to hire/transfer claims NCS argues with respect to the Plaza Building receptionist position that plaintiff cannot show either that she was qualified for the position or that the articulated reason for hiring Mary Lenz was pretextual. With respect to the programmer aide position, defendant argues plaintiff cannot show she was qualified for the job or that a younger person received the job.

## A. Discharge

NCS focuses on the fourth element of Sheets' prima facie case. Sheets contends the Court should look to the twenty-five year old temporary employee, Catherine Meier, as the relevant replacement, not the person eventually hired to permanently replace Sheets, Mary Steckley, who was three and one-half years older than Sheets. Sheets notes that Steckley was hired about a month after she filed her civil rights complaint and argues this raises an inference that Steckley was hired to "innoculate defendant from a charge of discrimination."

The limited case law in this area suggests the Court should look to the permanent replacement employee, not the temporary fill-in. See, e.g., Hawkins v. Ceco Corp., 883 F.2d 977, 984 (11th Cir. 1989), <u>cert. denied</u>, 495 U.S. 935 considered was (1990)(replacement to be minority hired permanently, not nonminority temporary worker); Ashagre v. The Southland Corp., 546 F. Supp. 1214, 1219 (S.D. Tex. 1982)(plaintiff's replacement was minority hired on permanent basis, not existing nonminority employee who worked shift temporarily). The requirement that the plaintiff be replaced with a younger person is, in an age discrimination case, simply the typical method of demonstrating that the discharge "occurred under circumstances which [give] rise to an inference of unlawful discrimination." Keathley, 187 F.3d at 921. This Court believes that, generally, the permanent replacement offers the more reliable barometer of the presence or absence of invidious intent. Certainly, had Steckley filled in temporarily and the much younger Meier been hired as the permanent replacement plaintiff would not concede the lack of a prima facie case.

However, the fact that an older employee was hired to replace plaintiff does not automatically negate a prima facie case. Particularly would this be so if there were reason to

believe the hiring of the replacement was part of the pretextual plan to mask discrimination.

In the case of race discrimination, the Eleventh Circuit has observed that "a prima facie case is not wholly dependent upon meeting the fourth requirement of the McDonnell Douglas test. A plaintiff may have a prima facie case based on the first three requirements despite the fact that the employer hired a minority to fill the vacancy left by the plaintiff." Edwards v. Wallace Community College, 49 F.3d 1517, 1521 (11th Cir. 1995); see Perry v. Woodward, 199 F.3d 1126, 1138 (10th Cir. 1999) (replacement of plaintiff by another minority did not destroy her prima facie case of discrimination); Williams v. Ford Motor Co., 14 F.3d 1305, 1308 (8th Cir. 1994)(it was error to require plaintiff to show replacement by a nonminority to establish prima facie case); Jones v. Western Geophysical Co., 669 F.2d 280, 284 (5th Cir. 1982)(prima facie case may exist since replacement by another minority might be pretext to disguise discrimination); Ashagre, 546 F. Supp. at 1219.

. . . the court must consider whether the fact that a minority was hired overcomes the inference of discrimination otherwise created by the evidence presented by the plaintiff. Courts considering such a situation have looked at several factors including the length of time between the discharge and the replacement, whether the replacement by the hired minority occurred after the filing of an E.E.O.C. complaint,

and, if the hired person had a history with the employer, whether it was a positive history.

Edwards, 49 F.3d at 1521 (citing Howard v. Roadway Express,
Inc., 726 F.2d 1529, 1534-35 (11th Cir. 1984)).

A relevant example of circumstances in which the selection of a minority replacement nonetheless permitted "an inference of unlawful discrimination" is found in Jones. In that case plaintiff's purported replacement was a minority individual who had been rehired by defendant at least six times and either resigned or been fired for incompetence by defendant repeatedly. 669 F.2d at 284-85. There was also a factual issue whether the individual actually replaced plaintiff. <u>Id.</u> at 283-84. Howard, a lapse of eleven months between defendant's failure to hire plaintiff and the hiring of another minority individual for what defendant alleged was the same position, coupled with the fact the replacement was hired after plaintiff filed his EEOC complaint were circumstances which the Eleventh Circuit held "scarcely rule[d] out the inference of discrimination in connection with earlier denial the of [plaintiff's] application." 726 F.2d at 1535.

Nothing about the circumstances surrounding Steckley's hiring would support a reasonable inference that she was hired to insulate NCS from the charge of age discrimination by Sheets

or otherwise that she was the victim of age discrimination. Sheets was discharged on April 17, 1995. She filed her complaint with the Iowa Civil Rights Commission on May 8, 1995. Steckley was an NCS employee whose job was tied to an NCS contract which had ended, requiring her to search and apply for another position within NCS. The summary judgment record indicates Sheets' position was posted, but even if there is a dispute on this point, there is no indication the hiring process was irregular. (See Phipps Depo. at 30). Nor is there anything unusual about temporarily staffing an open position with an existing employee. At the time she filled in for Sheets, Meier was classified as a "temporary employee." (NCS Document 2365 "Temporary Employee Payroll Set-up Form").

Ranard has stated she did not know how old Steckley was nor did she know that Sheets had filed her civil rights complaint at the time she hired Steckley. There is no evidence in the summary judgment record from which a reasonable fact finder could infer otherwise. While Steckley's hiring occurred after Sheets filed her civil rights complaint, the hiring followed Sheets' discharge by only about seven weeks, not a remarkable period of time. In sum, the decision maker's lack of knowledge of the discrimination charge and the apparent regularity of the process by which Steckley was hired make it

appropriate to conclude plaintiff has not satisfied the fourth requirement necessary to make out a prima facie case of age discrimination.

Even if the Court were to assume a prima facie case, plaintiff has not identified sufficient evidence to permit a reasonable factfinder to conclude that the reason given for her discharge, unsatisfactory performance, was a pretext for age discrimination. The fact remains that soon after Sheets was discharged, Ranard hired an older person to replace her. Sheets' co-worker, Sueppel, was only two years younger than Sheets. Though she received at least one Action Plan warning during the same period Ranard was complaining to Sheets about her performance, Sueppel was not let go. These facts are against any finding that age was a motivating factor in Ranard's discharge decision.

As evidence of pretext Sheets argues that Ranard's decisions were colored by animosity toward her, she disputes the factual basis for Ranard's opinions about her performance, and she criticizes Ranard as an inexperienced and ineffectual manager. There is evidence to support these criticisms of Ranard, but that evidence is not inconsistent with a perception, however ill-founded, on Ranard's part that Sheets' performance as a switchboard operator and receptionist was unsatisfactory.

Sheets' pretext evidence raises more a question of managerial competence and fairness, than a "suspicion of mendacity." <u>Hicks</u>, 509 U.S. 511. It is essentially the same as that she relies on for the second element of the prima facie case, that she was meeting the legitimate expectations of her employer.

"[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves, 530 U.S. at \_\_\_\_, 120 S. Ct. 2109. But "such evidence will not necessarily permit that conclusion." Tatom, 228 F.3d at 931 (emphasis original). The question turns on the circumstances of each particular case. Reeves, 530 U.S. at \_\_\_\_, 120 S. Ct. at 2109. Among the relevant factors are "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." Id.

For the reasons previously indicated, the prima facie case here is weak and the evidence of pretext is not probative of age discrimination. Though not always required (in fact in light of Reeves, usually not required), it is appropriate in this case to consider the absence of independent evidence of

age-based discriminatory animus on the part of those involved in the discharge decision. <u>Fisher</u>, 225 F.3d at 922. Viewed in this light, the evidence in the summary judgment record is not sufficient to raise a reasonable inference that age was a determinative factor in plaintiff's discharge. <u>Id</u>.

## B. <u>Failure to Hire/Transfer</u>

Sheets also claims that her age was the reason why she was not hired for two positions for which she applied before her termination.

The first position was that of receptionist in a new building on the NCS campus. The summary judgment record is meager on this part of plaintiff's claim. There is a minor dispute over whether typing was a requirement for the position, but as NCS concedes, for motion purposes it is appropriate to consider that typing was not a requirement. (NCS Reply at 4). The position was posted in September 1994 and not filled until 1995. Sheets January had worked switchboard as operator/receptionist at NCS for fifteen years and had an additional seven years at the company in other clerical and production positions. Mary Lenz, the individual who was hired, was 48 years old. Her work experience included fourteen years as a school secretary and six years as a secretary/switchboard operator/receptionist for an architectural firm.

Ranard apparently made the hiring decision. (Lenz Depo. at 4). The only evidence as to why Sheets was not hired is in her deposition testimony that human resources representative Gross-Advani called and told her she would not be interviewed because she did not qualify for the job. (Sheets Depo. at 25). NCS argues that at the time of the hiring decision Sheets' work performance had not, in the view of her supervisor Ranard, been satisfactory which, it says, supports the legitimate non-discriminatory reason for not hiring her that Lenz was better qualified.

"[I]t is common business practice to pick the best qualified candidate for promotion. When that is not done, a reasonable inference arises that the employment decision was based on something other than the relative qualifications of the applicants." McCullough v. Real Foods, Inc., 140 F.3d 1123, 1129 (8th Cir. 1998); see Duffy v. Wolle, 123 F.3d 1026, 1037 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998). "Where . . . the employer contends that the selected candidate was more qualified for the position than the plaintiff, a comparative analysis of the qualifications is relevant to determine whether there is reason to disbelieve the employer's proffered reason for its employment decision." Chock v. Northwest Airlines, Inc., 113 F.3d 861, 864 (8th Cir. 1997). However, federal courts do not

sit as "superpersonnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to involve the extent that those judgments intentional discrimination." McCullough, 140 F.3d at 1129; Duffy, 123 F.3d at 1038; <u>Chock</u>, 113 F.3d at 864. Therefore, "pretext cannot be simply by identifying minor differences plaintiff's qualifications and those of successful applicants. (Citations omitted). The disparity in qualifications must be 'overwhelming' to be evidence of pretext." Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1319 (10th Cir. 1999)(quoting Sanchez v. Phillip Morris, 992 F.2d 244, 247 (10th Cir. 1993)).

Sheets was qualified to work as a receptionist. However, objectively, she and Lenz were similarly qualified. Both had substantial relevant employment experience, including many years as receptionists and answering the telephone for their employers. Accordingly, the relative qualifications of Lenz and Sheets do not support an inference of discrimination. Chock, 113 F.3d at 864.

Ranard made the hiring decision. It is the fact that, whether or not formal warning had been given Sheets, Ranard had raised questions about Sheets' performance at the time the receptionist job came open. As noted previously, the evidence does not support the conclusion that Ranard's opinions about

Sheets' job performance were tainted with a discriminatory motive.

Sheets has not demonstrated that the reason proffered by NCS for hiring Lenz over her was pretextual. Here also, Sheets' prima facie and pretext evidence does not support a finding in her favor on the ultimate question of whether NCS intentionally discriminated against her on the basis of her age.

Finally, defendant argues that plaintiff cannot establish a prima facie case with respect to the programmer aide position, either because she was not qualified for the job or because she cannot show that a younger person was hired. Plaintiff argues that the fact she was interviewed for the position means she was qualified but concedes that at present she cannot establish a younger person received the job. The record concerning the programmer aide position is even more limited. From Sheets' deposition it appears that the position was in another department and the department manager who interviewed Sheets, Fred Hackett, would have been the principal

<sup>&</sup>lt;sup>8</sup> Plaintiff argues NCS did not follow its own policies in considering her for the receptionist job which required that "[a]ll regular employees must be rejected before . . . external candidates are considered for open positions." See infra at 7 n.1. It is not clear whether Sheets was rejected before Lenz was considered, though the timing would suggest that was the case. Sheets was certainly rejected in favor of Lenz. The failure, if any, to follow company procedures in this regard is not, however, probative of a discriminatory motive on Ranard's part.

decision maker. (Sheets Depo. at 19-20). Sheets was terminated the day she would have found out who received the job. Since the age of the person who was hired for the programmer aide job is peculiarly within the knowledge of NCS, the Court would not grant summary judgment solely on that element of the prima facie case. Still, when discrimination is denied it is incumbent on plaintiff to come forward with evidence that unlawful discrimination is the reason she was not hired. Sheets does not identify any evidence which would support a conclusion that her age was a motivating factor in not offering her the programmer aide job.

IV.

Defendant has shown that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. The motion for summary judgment is granted and the Clerk shall enter judgment dismissing the complaint.

IT IS SO ORDERED.

Dated this \_\_\_\_\_ day of December, 2000.

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ROSS A. WALTERS

CHIEF UNITED STATES MAGISTRATE JUDGE